85-1346

Supreme Court, U.S.
FILED
FEB 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Petitioner,

vs.

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

FRANCIS RALPH MATERA*
RICHARD A. HAGEN
CROWELL, ROUSE, VARIAN,
HAGEN & MATERA
111 Broadway
New York, New York 10006
(212) 732-3464

Counsel for Petitioner
Companhia de Navegacao Lloyd Brasileiro

*Counsel of Record

4918

QUESTIONS PRESENTED

1. Whether an ocean carrier remains a bailee of cargo after delivery of the cargo at the port of destination into the possession of the local port authority as there required.

2. Whether the pallets or the number of bags contained thereon are "Cogsa" packages for the purpose of the $500. per package limitation, 46 U.S.C. 1304 (5) where the Bill of lading states "150 pallets said to contain 6,000 bags."

3. Whether a shipper can make the carrier an insurer by merely stating the value of the shipment on the fact of the bill of lading without paying the *ad valorum* freight rate as required by the carrier's tariff filed with the Federal Maritime Commission.

4. Whether foreign law applies to a tort committed abroad.

PARTIES TO THE PROCEEDINGS

The parties having an interest in the outcome of this case pursuant to Rule 21.1(b) of the Rules of the Supreme Court, are listed in order that the Justices of this Court may evaluate possible disqualification or recusal, and are as follows:

1. Companhia de Navegacao Lloyd Brasileiro, a foreign corporation owned by a Federative Republic of Brasil.

2. Allied Chemical International Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Authorities	iv
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons For Granting The Petition For Writ of Certiorari	4
1. There Is A Conflict Between Circuits As To The Obligation Of The Ocean Carrier Following Delivery Of Cargo To A Port Authority	4
2. The Function Of The Federal Court System Is To Insure Uniformity In The Application Of Maritime Law	6
3. The Court Below Improperly Found The Carrier Liable For An Ad Valorum Bill Of Lading	9
4. Foreign Tort Law Should Apply	11
Conclusion	13
Appendix A	A-1
Appendix B	A-8
Appendix C	A-10
Appendix D	A-29

TABLE OF AUTHORITIES

	Page
All Commodities Supplies Ltd. v. M/V Acritas, 1982 AMC 166 (ED. La. 1981) (not officially reported)	4
Allied International v. Yang Ming, 672 F.2d 1055 (2nd Cir. 1982)	8, 9
Allstate Insurance v. Imparca Lines, 646 F.2d 166 5th Cir. (1981)	4, 5, 6
Bahrain Insurance Co. v. M/V Trein Maersk, 1984 AMC 354 (SDNY 1984) (not officially reported)	8, 9
Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415 (5th Cir. 1981)	9
Cameco, Inc. v. S.S. American Legion, 514 F.2d 1291 (2nd Cir. 1974)	8
Consol. Intl. Corp. v. Falcon, 1983 AMC 270 (SDNY 1982) (not officially reported)	5
Constable v. National Steamship Company, 154 U.S. 51, 14 S.Ct. 1062, 38 L.Ed. 903 (1894)	4, 6
David Crystal, Inc. v. Cunard Steam-Ship Co., 339 F.2d 295 (2nd Cir. 1964)	5, 6
DuPont de Nemours International v. S.S. Mormacvega, 493 F.2d 97 (2nd Cir. 1974)	8
Exim Industries v. Pan American, 754 F.2d 106, 108 (2nd Cir. 1985)	8
Farrell Lines v. Highlands Ins. Co., 532 F.Supp. 77, aff. 696 F.2d 28 2nd Cir. (1982)	4

	Page
Gordon v. Eastern Air Lines, Inc., 391 F.Supp. 31 (SDNY 1975)	12
Komatsu, Ltd. v. States Steamship Company, 674 F.2d 806 (9th Cir. 1982)	9
La Interamericana v. Delta S.S., 1984 AMC 2972, (ED. La. 1983), aff. 736 F.2d 1524 (5th Cir. 1984)	4
La Seguridad v. Delta S.S., 1981 AMC 996, (SD Fla. 1980)	10
Menley & James Laboratories Ltd. v. M/V Hellenic Splendor, 433 F.Supp. 254 (SDNY 1977)	8
Mitsui & Co. Ltd. v. American Export Lines, 636 F.2d 807 (2nd Cir. 1981)	8
Omark Industries v. Associated Container, etc., 420 F.Supp. 139 (D. Or. 1976)	8
Reed v. Wiser, 555 F.2d 1079, (2nd Cir. 1977) cert. den. 434 U.S. 922	8
Tapco Nigeria, Ltd. v. M/V Westwind, 702 F.2d 1251 5th Cir. (1983)	4, 5
Trotter & Co. v. Delta S.S. Lines, 1985 AMC 2783 (ED Pa. 1982)	7, 8
Wuerttembergische v. M/V Stuttgart Express, 711 F.2d 621, 622 5th Cir. (1983)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Petitioner,

vs.

ALLIED CHEMICAL INTERNATIONAL CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

Petitioner, Companhia de Navegacao Lloyd Brasileiro, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding after a petition for rehearing and rehearing *en banc* were filed with the aforesaid Court and said petitions were denied by Order dated November 20, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit reported at 775 F.2d 476 of which review is sought was issued October 15, 1985 and is printed as Appendix C. The proceedings below prior to that opinion were as follows:

On January 18, 1985, a decision was rendered by District Judge Owen after submission of the case based upon stipulated facts and is printed as Appendix A.

A judgment was entered thereon and is printed as Appendix B.

JURISDICTION

Within the time provided, Petitioner moved for a rehearing and a rehearing *en banc* to review the above decision by the Court of Appeals for the Second Circuit. The motion was denied by an order of the Court of Appeals dated November 20, 1985, which is printed as Appendix D. This petition for a Writ of Certiorari was filed within ninety (90) days of that date as required by 28 U.S.C. 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The United States Carriage of Goods by Sea Act, 46 U.S.C. §1300 et seq.

The Harter Act, 46 U.S.C. §190 et seq.

The Pomererne Act, 49 U.S.C. §81 et seq.

STATEMENT OF THE CASE

On September 10, 1981, Allied Chemical International Corp. (Allied) commenced an action in the United States District Court for the Southern District of New York against Companhia de Navegacao Lloyd Brasileiro (Lloyd), a common carrier by water, for the total value of a shipment of 150 pallets said to contain 6,000 bags of a chemical, caprolactum, which was carried

without incident from the Port of Norfolk, Virginia to the Port of Salvador, Brasil where the cargo was discharged and delivered without loss or damage to the governmental Port Authority which was charged by local law and the custom and usage of said port to receive same.

The plaintiff contended that the defendant breached the terms of the contract of carriage and the provisions of the U.S. Carriage of Goods By Sea Act, (COGSA), 46 U.S.C. §1300 et seq. by the carrier's agent signing a letter acknowledging that the ocean freight and merchant marine tax had been paid which letter was improperly used by the ultimate receiver to obtain possession of the shipment from the governmental Port Authority without surrender of the bill of lading. The defendant argued that in accordance with the terms of its bill of lading and pursuant to local custom and usage at the port of discharge it made a valid delivery by delivering the cargo into the custody of the local Governmental Port Authority and was not liable for any subsequent loss. However, if it was liable, its liability was limited to $500. per package (pallet) pursuant to COGSA, 46 U.S.C. 1304(5).

The District Court rendered an opinion on January 18, 1985, virtually adopting plaintiff's proposed Findings of Fact and Conclusions of Law without comment or recitation of authority and awarding plaintiff a full recovery. That decision is set forth in Appendix A.

On appeal, the Second Circuit Court of Appeals, while critical of the District Court's opinion, affirmed the District Court's award in favor of the plaintiff.

The basis for affirmance of the District Court was an erroneous conclusion as to the law of maritime carriage in conflict with settled authorities concerning delivery to the local governmental port authority, the misapplication of the law of bailment and the disturbance of the settled law on package limitation under COGSA, 46 U.S.C. §1304 (5)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. THERE IS A CONFLICT BETWEEN CIRCUITS AS TO THE OBLIGATION OF THE OCEAN CARRIER FOLLOWING DELIVERY OF CARGO TO A PORT AUTHORITY.

The Second Circuit held below that the ocean carrier remained liable as a bailee of the cargo following delivery to the Port Authority in Salvador, that as bailee it had a continuing responsibility for delivery of the goods and that any bill of lading clauses to the contrary were void and unenforceable.

This decision is contrary to the prior decision of the Second Circuit in *Farrell Lines v. Highlands Ins. Co.*, 532 F. Supp. 77, aff. 696 F.2d 28, (1982), the decisions of the Fifth Circuit in *Allstate Insurance v. Imparca Lines*, 646 F.2d. 166 (1981), and in *Tapco Nigeria, Ltd. v. M/V Westwind*, 702 F.2d 1251 (1983) and the decision of this Court in *Constable v. National Steamship Company* 154 U.S. 51, 14 S.Ct. 1062, 38 L.Ed. 903 (1894). A similar result was reached in *All Commodities Supplies Ltd. v. M/V Acritas*, 1982 AMC 166 (ED. La. 1981) (not officially reported) and in *La Interamericana v. Delta S.S.* 1984 AMC 2972, 2978 (ED La.1983) aff. 736 F.2d 1524 (5th Cir. 1984).

In *Constable v. National Steamship Co.*, this Court held at page 154 U.S. 63.:

> "No rule is better settled that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility".

More recently, the Fifth Circuit Court of Appeals in *Allstate Insurance v. Imparca Lines*, supra, concluded that delivery to the Venezuelan Port Authority discharged the carrier's obligations. The Court at 646 F.2d 169 stated:

> "We conclude the evidence overwhelmingly supports the district court's finding of fact that the container was unloaded from the vessel and placed on the dock

> in the control of INP. This constitutes delivery as a matter of law, in accordance with the bill of lading and the custom and usage of the port. The district court's legal conclusion that delivery never occurred is thus in error, and is accordingly reversed. Delivery had taken place, and the carrier's responsibility for the goods was discharged before the container disappeared, and accordingly the district court shall on remand enter judgment for Imparca."

The Court approved clause 12 of the *Imparca* bill of lading which is identical to the clause contained in petitioner's bill of lading which read:

> "The responsibility of the Carrier in any capacity shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities . . ." Imparca, supra, at 646 S 2nd 167 n.1.

In *Tapco Nigeria Ltd. v. M/V Westwind*, at 702 F.2d 1262 the Fifth Circuit held that there was good delivery under the Harter Act when the cargo was delivered . . . .

> "to persons charged by law and usage of the port with the duty to receive cargo and distribute it to the consignee." See also *Consol Intl. Corp. v. Falcon*, 1983 AMC 270 (SDNY 1982) (not officially reported).

The Court below erroneously relied on the case of *David Crystal, Inc. v. Cunard Steam-Ship Co.* 339 F.2d. 295 (2nd Cir. 1964) for the proposition that an ocean carrier has a continuing obligation as a bailee following discharge of cargo onto a receiving pier. In that case, the cargo was discharged into the hands of the carrier's independent stevedore and subsequently was misdelivered by the carrier's agent through use of a fraudulent delivery order. There was no contention, in *Crystal*, supra, that the goods had been delivered, constructively or otherwise, to the consignee or to a governmental agency.

In the instant case, the Second Circuit disregarded the numerous decisions that applied the tenents of this Court's promulgation in *Constable*, supra, as relates to the custom and usage at the port of discharge. The *Crystal* decision is clearly not authority for the law of delivery abroad and the effect of compulsory delivery to a foreign governmental port authority and thus was misapplied by the Court below.

The bill of lading clause held void herein by the Second Circuit had been specifically approved by the Fifth Circuit in *Imparca*, supra, at 646 F.2d 167, n.1.

2. THE FUNCTION OF THE FEDERAL COURT SYSTEM IS TO INSURE UNIFORMITY IN THE APPLICATION OF MARITIME LAW.

The bill of lading issued by petitioner read as follows: (quoting from the Court at 775 F.2d 485).

> "The bill of ladin herein contained six columns under the usual general headings 'Particulars Furnished by Shipper'. Only two of those columns and only a few of the items appearing in those columns are important to our decision. The first column, headed "No. of Packages' contained the entry '150'. Immediately to the right of that number, squarely in the column labeled 'Description of Packages and Goods,' was entered 'Double Faced Pallets Said to Contain: 6,000 Bags Caprolactum . . ."

and

> "We conclude that the district court's finding that the parties did not intend the pallets to be packages was not clearly erroneous" at 775 F.2d 486.

The foregoing language of the Second Circuit indicates that the bill of lading clearly sets forths the number of packages to be carried by the vessel; i.e. 150 pallets. Nevertheless, without any other evidence, the Court below improperly held that the District Court's finding regarding the intent of the parties "was not clearly erroneous."

It is clear that there was no evidence of the intent of the parties, other than that set forth in the commercial invoice and the ocean bill of lading wherein each enumerated the number of packages as "150 pallets".

If the panel's opinion remains unmodified, uniformity in the application of maritime law is destroyed and the jurisprudence of *stare decisis* can no longer be relied upon in the preparation of a bill of lading or other shipping documents in ocean commerce.

In *Trotter & Co. v. Delta SS. Lines*, 1985 AMC 2783 (E.D. Pa. 1982) (not officially reported), Judge VanArtsdalen held at page 2792.

> ". . . One purpose of COGSA's package limitation is to describe 'a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that the *parties would easily ascertain at the time of contract* when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation. Nichimen, supra, . . . 462 F.2d at 225, quoting Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, . . . 375 F.2d 943, 946 (2nd Cir. 1976). cert. denied 389 U.S. 831 . . . (1967) (emphasis added).
>
> The goals of uniformity and predictability are best served by considering the manifestation of the parties' intent as evidenced by their own descriptions of 'packages' on documents. As business people routinely engaged in commerce, a shipper and carrier must be presumed to know that the word 'package' is a term of art under COGSA and to have understood the consequences of their actions when they utilized that term in their contracts. See Aluminios, supra . . . 407 F.2 at 156. To ignore the parties' use of the term 'package' would inject more uncertainty into this already troublesome area."

Thus, uniformity in the application of the laws of foreign commerce is a necessity and wholly desirable *Reed v. Wiser*, 555 F.2d 1079, 1083 (2nd Cir. 1977) cert. den. 434 U.S. 922; *Exim Industries v. Pan American*, 754 F.2d 106, 108, (2nd Cir. 1985). To permit Allied to contradict its own use of the term "package" i.e. "pallet", in view of the clear language of the documents would undermine COGSA's goals of uniformity and predictability. *Trotter*, supra, at 1985 AMC 2793.

Also, this will be the first case where the shipper has chosen to palletize its cargo and to list the pallets as the number of packages in a bill of lading that a court has held that it was not the shipper's intent that a pallet would be deemed the shipping package.

It will also be the first case where a Court has postulated that the number of times the number of packages are mentioned in a bill of lading may be determinative of the intention of the parties (at 775 F.2d 485). Was this the intent of the Second Circuit's decision in *Allied International v. Yang Ming*, 672 F.2d 1055 (2nd Cir. 1982) and upon which the Court heavily relied for its rationale in the case presently before this Court?

In these days of containerized cargo, courts have wrestled with the issue as to whether a container is a package. However, container cases involve factors not found in pallet cases, *Yang Ming*, supra. at 672 F.2d 1061. It has been uniformly held that where the bill of lading states that the cargo is palletized, the number of pallets has determined the application of the $500. package limitation. *Cameco, Inc. v. S.S. American Legion*, 514 F.2d 1291 (2nd Cir. 1974), *DuPont de Nemours International v. S.S. Mormacvega*, 493 F.2d 97 (2nd Cir. 1974), *Bahrain Insurance Co. v. M/V Trein Maersk*, 1984 AMC 354 (SDNY 1984) (not officially reported), *Menley & James Laboratories Ltd. v. M/V Hellenic Splendor*, 433 F.Supp 254 (SDNY 1977), *Omark Industries v. Associated Container, etc.*, 420 F.Supp. 139 (D.Or. 1976), and even where the cargo was not actually palletized, *Mitsui & Co. Ltd. v. American Export Lines*, 636 F.2d 807 (2nd Cir. 1981).

In the *Yang Ming* case, supra, the Second Circuit held at 672 F.2d 1056-7:

> ". . . we are convinced that the case is controlled by the explicit statements in the bill of lading that the total number of packages was thirty. In order to reach a total of thirty, one must count the pallets as 'packages' ".

In *Bahrain Ins. v. Trein Maersk*, supra, at 1984 AMC 357, the District Court affirmed a magistrate's holding:

> "We are of the view, for reasons hereinafter discussed, that the 'package' should be deemed the pallet and that each carton thereon does not represent a separate and distinct COGSA 'package' "

Since all parties to a bill of lading must rely on the judicial interpretation of the provisions inserted in said document, this unusual decision has injected an unsettling ambiguity into the maritime law relative to the carriage of goods which compels analysis, clarification and review of the opinion below so that commercial men may rely on a clear understanding as to the effect of enumerating packages on a bill of lading.

3. THE COURT BELOW IMPROPERLY FOUND THE CARRIER LIABLE FOR AN *AD VALORUM* BILL OF LADING

The Court of Appeals held the petitioner to be an insurer of the goods because the shipper stated the value of the goods on the face of the bill of lading for the purpose of establishing a freight rate. Thus, in the "Description of Packages and Goods" section of the instant bill of lading there was also stated "Rate: $110.00 LT, Value: $1,657.00 LT". The abbreviation LT stands for "long ton", the equivalent of 2,240 pounds. This insertion was solely for the purpose of obtaining the lower regular freight rate for this commodity and had no function in assessing an *ad valorum* rate. In essence, an *ad valorum* freight bill of lading calls for the payment of an additional freight charge, usually 2% of the declared value, plus the regular freight rate (in this case $110.00 per LT) in the event the shipper desires to be covered for a value in excess of $500.00 per package.

The terms of the carrier's filed tariff as a matter of law are binding upon the shipper *Brown & Root, Inc. v. M/V Peisander* 648 F.2d 415, (5th Cir. 1981), and *Komatsu, Ltd. v. States Steamship Company* 674 F.2d 806, (9th Cir. 1982). The ordinary bill of lading becomes an *ad valorum* bill of lading only when the shipper declares the value and pays the additional *ad valorum* charge set forth in the carrier's tariff filed with the Federal Maritime Commission.

The Fifth Circuit Court of Appeals in *Wuerttembergische v. M/V Stuttgart Express*, 711 F.2 621, 622 (1983) held:

> ". . . we have firmly established the position in PEISANDER that the option need not be included on the face of the bill of lading, 648 F.2d at 425. Further, we concluded that the shipper carries the burden of proving that an opportunity for choice of evaluations and rates did not in fact exist. 648 F.2 at 424. As to the burden of proof issue, we are in agreement with the position of the United States Court of Appeals for the Second Circuit. Petition of Isbrandsten Co., 201 F.2d 281, 285 (2d Cir. 1953).
>
> Under COGSA the valuation per package was $500. The option to increase valuation by declaration and paying a higher freight was clear in the tariff which was in terms incorporated into the bill of lading. The option not having been expressed, the $500. per package limitation applies."

and

> "While the $500 per package minimum may be unrealistic in today's economy, the remedy must come from Congress. Until that occurs, an experienced shipper should not be permitted to gamble that no damage will occur, pay the customarily lower freight rates for goods of undeclared value, and then, when destruction in fact occurs, cry 'I did not know' and seek an exception to its own obligation 46 U.S. Code, sec. 1304(5)." (not officially reported). *La Seguridad v. Delta S.S* 1981 AMC 996, 1003. (SD Fla. 1980)

Thus, the Court below improperly concluded that the subject bill of lading was an *ad valorum* bill of lading despite any evidence in support thereof.

If shippers are reluctant to pay a higher rate and choose instead to gamble on safe delivery, they cannot argue later that the $500 package limitation of liability is inequitable *Trotter*, supra, at 1985 AMC 2789.

If the instant case is permitted to stand, this Court will in some future time be confronted with this issue. Succintly, if a shipper places a value on the face of a bill of lading without anything further, makes no declaration to the carrier that it is disclosing a value for the purpose of obtaining the carrier's unlimited liability and pays no higher freight rate, does the shipper unilaterally transform an ordinary bill of lading into an *ad valorum* bill of lading? This is the situation which bespeaks of judicial instruction in favor of this petitioner.

4. FOREIGN TORT LAW SHOULD APPLY

All of the events which took place in Brasil after completion of the carriage of goods should have been reviewed under the laws prevailing in the Federative Republic of Brasil. The Court below refused to consider the laws of Brasil despite the fact that the alleged acts of the defendant occurred there following completion of the ocean carriage. The Court of Appeals rejected evidence of Brasilian law that the carrier was not liable for misdelivery by the Port Authority or guilty of conversion since it did not have physical possession of the goods.

The Court stated at 775 F.2d 484:

> "It is surely obvious at this point that Lloyd's Brazilian law arguments are inapposite. The rights and obligations of the parties herein are rooted in United States Law. Both COGSA, 46 U.S.C. app. §1300, and the Harter Act, 46 U.S.C. app. §190, cover transactions involving carriage from ports in the United States to foreign ports."

It is primer law that the law of the place of the tort is controlling. In *Gordon v. Eastern Air Lines, Inc.*, 391 F.Supp. 31, 33 (SDNY 1975), the Court held:

> "More specifically, the New York Court of Appeals, in *Babcock v. Jackson*, supra, has carefully distinguished between those cases where the defendant's exercise of due care is in issue and those cases where the sole issue is the extent of plaintiff's recovery. In the former situation, the law of the state where the tort occurred controls.'
>
> 'In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place"

By its mistaken holding that the defendant remained liable as a bailee, the Second Circuit found it unnecessary to discuss foreign law. It is submitted that the Court erred in failing to do so.

CONCLUSION

The questions presented to this Court are of paramount importance to the shipping industry and the uniform application of the Carriage of Goods by Sea Act.

For these reasons, a Writ of Certiorari should be granted.

Respectfully submitted,

CROWELL, ROUSE, VARIAN, HAGEN & MATERA

FRANCIS RALPH MATERA*

Of Counsel:
Richard A. Hagen

Counsel for Petitioner
COMPHANIA DE NAVEGACAO LLOYD BRASILEIRO

* *Counsel of Record*

APPENDIX

APPENDIX A

~~PLAINTIFF'S PROPOSED~~ *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

81 Civ 5643(RO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLIED CHEMICAL INTERNATIONAL CORP.
Plaintiff,

vs.

COMPANHIA DE NAVEGACAO Lloyd Brasileiro,
Defendant.

~~Plaintiff Allied Chemical International Corp., ("ALLIED")~~ RO ~~respectfully requested~~ The Court ~~to make the following~~ findings of facts and conclusions of law:*

FINDINGS OF FACT

1. Allied was and still is a corporation duly organized and existing under the laws of the State of Delaware and qualified to do business in the State of New York with offices and a place of business in the City, County and State of New York. It is engaged in the business of exporting chemical products manufactured by Allied Fibers and Plastics Co., a division of Allied Corporation, parent company of the plaintiff.

2. Defendant Companhia De Navegacao Lloyd Brasileiro ("Lloyd") was and still is a corporation organized under the laws of the Federative Republic of Brasil, with its principal place of business in Brasil, with an office and place of business in the City, County and State of New York. It is engaged in the business of an ocean common carrier of freight for hire, between ports in the United States and ports of Brasil, and in conducting said business, owned and operated the vessel "Itapura."

3. In September 1980, Allied received an order for a certain quantity of a product called caprolactam from a Brasilian company called Banylsa Tecelagem Do Brasil, S.A. ("Banylsa").

---

* Editing marks made by District Court and reflect original document.

4. On October 20, 1980, at Norfolk, Virginia, pursuant to said order, Allied delivered to Lloyd 6,000 bags of caprolactam ("the Cargo") to be loaded and shipped aboard the Itapura to the Port of Salvador, Brasil.

5. Lloyd issued a clean Bill of Lading, describing the aforesaid cargo, showing Allied as the shipper, that the cargo was consigned to the order of Banylsa and describing Banylsa as the "notify party".

6. The invoice price for the sale of the said caprolactam from Allied to Banylsa was $266,756.92, C & F Salvador. The terms of sale were sight draft against documents through Banco Bamerindus Do Brasil S.A. of Sao Paulo, Brasil ("the Brasilian bank"). Allied, through its own bank, United Californi Bank International, forwarded the required shipping documents, including a sight draft, the original bill of lading and the original commercial invoice No. 866477 to the Brasilian bank for handling and collection.

7. The cargo was carried by Lloyd aboard the Itapura to Salvador, Brasil and on November 12, 1980, Lloyd discharged said cargo in the same good order and condition as shipped at a warehouse under the control of the Administration of the Port of Salvador, a Brasilian government agency ("the Port Authorities").

8. On November 17, 1980, Banylsa delivered to Lloyd a letter said to be in accordance with a Brasilian customs regulation, #040, requesting Lloyd to furnish a document to Banylsa described as a "carta declaratoria" (in English, a "letter of declaration"), attesting that the freight and a merchant marine tax have been paid. On the same date, and in response to said letter, Lloyd delivered such a document to Banylsa, stating also that Lloyd does not object to the customs clearance of said cargo.

9. After obtaining said "carta declaratoria", and presumably after complying with other customs and port formalities, Banylsa obtained possession of said cargo from the Port authorities.

10. Banylsa did not pay the Brasilian bank or Allied the sum of $266,756.92 as provided for in the sight draft, did not obtain the original bill of lading from the Brasilian bank and did not surrender the original bill of lading to Lloyd or to anyone else.

11. After Banylsa obtained possession of the caprolactum, Banylsa used it in the manufacture of its yarn product, and then on or about January 26, 1981, made a complaint to Allied that the caprolactam was of inferior quality and demanded a credit. This was the first time that Allied became aware that Banylsa had obtained possession of the said cargo without paying the sight draft. Allied thereupon investigated and rejected Banylsa's claim and meanwhile was also investigating the circumstances surrounding Banylsa's obtaining possession of the cargo without making payment therefor. Indeed, Lloyd investigated and during that investigation, acknowledged that – it had acted improperly in releasing the goods without its surrender of the original Bill of Lading.**

RO

12. In due course, the original bill of lading and unpaid sight draft were returned by the Brasilian bank to Allied, who is in present possession thereof.

13. On April 3, 1981, Banylsa filed a voluntary proceeding in a Brasilian Court to obtain relief from its debts. On May 8, 1981, Allied made claim against Lloyd for the improper release of the cargo, but Lloyd refused to pay and Allied then instituted this suit on September 10, 1981. On May 20, 1981, Allied filed claim against Banylsa in the Brasilian Court proceeding in regard to this shipment and two other shipments on another vessel with another ocean carrier. Having taken steps to regain possession of the other two shipments from the Port authorities, which was eventually accomplished, Allied filed an amended claim on May 29, 1981 in the Banylsa proceeding in the sum of $266,756.92, the same amount as sued for herein.

14. On September 2, 1983, Banylsa deposited with the Brasilian Court 20,414,907 Cruzeiros for Allied's first and final distributive share in the receivership proceeding, based or Allied's claim of U.S. $266,756.92 at the exchange rate of 76.53 Cruzeiros to U.S. $1.00 in effect when Banylsa filed its petition on April 3, 1981. Allied's position was that it was entitled to 178,993,872.22

** Handwritten insert by District Court.

Cruzeiros based on the rate of 671 Cruzeiros to U.S. $1.00 in effect on the date of Banylsa's deposit, together with interest, but the Court rejected Allied's claim, approved Banylsa's deposit and terminated the proceeding. Allied filed an appeal to this ruling, claiming interest and additional Cruzeiros based on the current rate of exchange, but then withdrew the appeal upon receipt from Banylsa directly of a sum of money for interest and upon advice of counsel that its demand for additional Cruzeiros would be of no avail on the appeal and would tie up the principal for about three to four years. Accordingly, Allied received the following sums:

> 20,414,907 Cruzeiros equal to U.S. $30,424.60 (Principal) as of September 2, 1983
>
> 5,920,350 Cruzeiros equal to U.S. $8,823.17 (Interest as of September 2, 1983

15. After this suit was instituted, Allied kept Lloyd advised at various times during the Banylsa proceedings of settlement proposals which never materialized and of its intention to take its first and final distributive share, always reserving its rights against Lloyd, and while Lloyd never specifically consented or objected to Allied's efforts, it did acquiesce thereto.

16. On April 2, 1981, Allied's Brasilian attorney, with Allied's consent, released the original commercial invoice to Banylsa covering the said cargo, and on April 8, 1981, Banylsa surrendered the said invoice to Brasilian Customs authorities. In releasing the invoice to Banylsa, Allied's Brasilian attorney stated that it was being released for the sole purpose of Banylsa's avoiding a penalty due to Banylsa's not presenting said invoice as per an instrument assuming responsibility filed with Brasilian Customs in order to obtain possession of the cargo.

17. Allied performed its part of the contract of sale with Banylsa and there is no evidence that the caprolactam was of inferior quality.

18. Lloyd's long-form bill of lading, incorporated by reference into the short form bill of lading, provides *inter alia*, that:

(a) the bill of lading shall be construed and the rights of the parties thereunder determined according to the laws of the United States;

(b) the bill of lading shall be subject to the provisions of the U.S. Carriage of Goods by Sea Act ("COGSA"), which shall govern before goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier.

(c) The carrier shall not be liable for mis-delivery while the goods are not in the actual custody of the carrier.

(d) The responsibility of the carrier shall cease and the goods shall be deemed delivered when taken into the custody of customs or other authorities.

(e) The carrier shall not be liable for any loss in an amount exceeding $500 per package unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading and extra freight paid.

19. While the limitation of $500 per package is set forth in Lloyd's long form bill of lading, that specific defense was not pleaded by Lloyd in its answer. Lloyd pleads two general defenses, its "Second" alleging that delivery was made in accordance with Lloyd's long form bill of lading, and its "Third", alleging delivery in accordance with COGSA.

20. The bill of lading itself describes the cargo as "150 double faced pallets said to contain 6000 bags caprolactum. In the only correspondence between the parties before the commencement of this action, there is no reference to the number of packages nor did Lloyd ever claim the package limitation or even refer to it on its motion to dismiss on the grounds of *forum non convenience* previously before this Court, until it surfaced at a pretrial conference on September 22, 1983, when Lloyd raised it for

the first time. Allied characterized the shipment in its commercial invoice to Banylsa as "6000 packages. In the "carta declaratoria", Lloyd characterized the shipment as 150 pallets containing 6000 bags of caprolactam.

21. The bill of lading specifically declares the nature of the goods (caprolactam) and the value thereof to be $1,657 per long ton. A long ton is equivalent to 2240 pounds. According to Lloyd's tariff, if the value does not exceed $2,000 per 2240 pounds, the rate is $110 per ton, which is the rate actually charged by Lloyd. Neither Lloyd's tariff nor its bill of lading provide for any additional freight in the event of a declaration of value in excess of $500 per package.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of the action in admiralty, or alternatively, by virtue of diversity of citizenship and that the matter in controversy exceeds $10,000.00.

2. Allied, as the shipper in the bill of lading and thereby being a party to the contract of carriage, and being in possession of the original bill of lading in the same form as issued, is the real party in interest and has standing to bring this action.

3. This case is governed by United States law, not only of virtue of express provisions of various United States Statutes, 49 U.S.C. §81, 46 U.S.C. §190, 46 U.S.C. §1300 that so provide, but also by virtue of the express terms of the bill of lading and United States maritime law.

4. Under United States law, Lloyd's obligation under the contract of carriage with Allied was to deliver the cargo to the order of Banylsa, but only on the presentation by Banylsa of the original bill of lading duly endorsed by Banylsa, which Banylsa failed to do. Brasilian law imposes the same obligation on the carrier. Lloyd acknowledged this, and it is the only way these transactions--and there were three of them--could realistically go to completion.** RO

5. By releasing the cargo to Banylsa without obtaining the original bill of lading, Lloyd, as a common carrier, was absolutely liable to Allied for any loss Allied sustained by reason of the improper delivery, either for breach of contract or in conversion.

** Handwritten insert by District Court.

6. Lloyd cannot exonerate itself from such misdelivery by shifting responsibility to the Brasilian Port authorities with whom Lloyd deposited the cargo, for the reason that it was Lloyd own act of giving Banylsa a "carta declaratoria", amounting to a release of Lloyd's control over the cargo, that enabled Banylsa to obtain possession from the Brasilian Port authorities without production of the original bill of lading. If Lloyd had not issued the "carta declaratoria", Banylsa could not have obtained possession of the cargo unless it obtained a court order.

7. Nor is there anything in Lloyd's bill of lading, which is a contract of adhesion, or in Brasilian law or the custom at the Port, that excuses Lloyd for the misdelivery, when Lloyd itself brought the misdelivery about by its own act.

8. Lloyd not only did not follow the laws, regulations or customs of Brasil as to the release of cargo, but it also failed to adhere to its own Service Manual. It not only failed to obtain the original bill of lading, but it also failed to take any of the diligent steps for its own protection when the original is not submitted, as in a case where the bill is lost has disappeared, such as getting in touch with the shipper, publishing notices in a newspaper, seeking a Court judgment, obtaining an instrument from the consignee or its agent assuming responsibility, or obtaining a guaranty from a bank. Not having taken any of these steps, it is unnecessary for the Court to pass judgment on the legal consequences if it had.

9. Those Brasilian laws, provisions of the bill of lading, or United States Court decisions that may relieve the carrier of liability for cargo damage, shortages, physical loss or disappearance, occurring while the goods are in the custody of the Port authorities at the port of destination, are inapplicable to the case at bar.

10. Any efforts by Allied to recover from Banylsa, the person to whom the cargo was wrongfully delivered, or the delivery of the original commercial invoice to Banylsa for the sole purpose of enabling Banylsa to avoid a Brasilian customs penalty, at a time when Allied was trying to recover two other shipments from the Port authorities, did not constitute a waiver of Allied's rights

to recover against Lloyd, but the sums actually received by Allied from the Banylsa Court proceeding shall be applied in mitigation of damages.

11. The $500 package limitation in the bill of lading was not pleaded by Lloyd and was only raised two years after this suit was instituted and is not a defense now available to Lloyd.

12. In any event, based on the terms of the bill of lading, clearly setting forth the number of bags in each pallet, and the negotiations between the parties, Allied's commercial invoice and Lloyd's carta declaratoria, and because of the long delay by Lloyd in raising this defense, the parties intended that the package be each bag of caprolactam, rather than each pallet.

13. Moreover, Allied declared the nature and value of the cargo in the bill of lading, and there is no proof of any kind that Lloyd offered a choice of rates in its tariff or otherwise for purposes of the package limitation.

14. Allied paid Lloyd the agreed freight charge for delivery of the cargo, but Lloyd misdelivered the cargo in violation of its contractual obligation to Allied, and accordingly, Allied is entitled to recover the sum of $266,756.92, less the sum of $30,424.60 recovered from the Banylsa proceeding or the net sum of $236,332.32, plus interest from November 17, 1980, with Allied to give Lloyd a credit in its judgment for interest received from
RO the Banylsa proceeding in the sum of $8,823.17, together with costs and disbursements to be taxed by the clerk.**

15. Lloyd has failed to sustain its burden of proof on any of its other affirmative defenses, and accordingly, all of Lloyd's affirmative defenses are dismissed.

RO 16. Submit judgment accordingly on notice.*

/s/ R. Owen **
USDJ

January 18, 1985
Dated: ~~June 28, 1984~~

/s/ Irving Ronald Storch*
IRVING RONALD STORCH
Attorney for Plaintiff
Office & P.O. Address
One Old Country Road
Carle Place, N.Y. 11514
(516) 294-8160

** Handwritten insert by district court

APPENDIX B

81 Civ 5643(RO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALLIED CHEMICAL INTERNATIONAL CORP.
Plaintiff,

vs.

COMPANHIA DE NAVEGACAO Lloyd Brasileiro,
Defendant.

JUDGMENT

NO. 82,0206

This cause came on to be heard on the consent of the parties by the submission of the case to the Honorable Richard Owen on stipulations as to facts, the deposition of a witness, memoranda of law and an appendix, and the Court having decided that plaintiff is entitled to judgment herein in accordance with its findings of fact and conclusions of law dated January 18, 1985, it is hereby

ORDERED, ADJUDGED, AND DECREED that plaintiff ALLIED CHEMICAL INTERNATIONAL CORP., of 1411 Broadway, New York, New York recover from defendant COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, of 17 Battery Place, New York, New York the sum of $236,332.32 (after giving defendant a credit of $30,424.60), plus $88,308.92 as prejudgment interest from November 17, 1980 (after giving defendant a credit of $8,823.17), for a total of $324,641.24, plus interest on such sum after judgment at the rate of 9.09 percent (%) per annum from the date hereof, plus all costs and disbursements as taxed by the Clerk of the Court.

/s/ R. Owen
U.S.D.J.

Dated: New York, New York
January 20, 1985

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON FEBRUARY 5, 1985

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1125—August Term, 1984

(Argued May 8, 1985 Decided October 15, 1985)

Docket No. 85-7103

ALLIED CHEMICAL INTERNATIONAL CORP.,

Plaintiff-Appellee,

—v.—

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Defendant-Appellant.

Before:

MESKILL, KEARSE and WINTER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Owen, *J.*, finding Companhia de Navegacao Lloyd Brasileiro, an ocean carrier, liable to Allied Chemical International Corporation, a shipper, for misdelivery. Concluding that

the Carriage of Goods by Sea Act package limitation, 46 U.S.C. app. § 1304(5) (Supp. I 1983), incorporated into the bill of lading, did not reduce the carrier's liability, the court held that the shipper was entitled to recover the full value of the cargo.

Affirmed.

RICHARD A. HAGEN, New York City (Francis R. Matera, Crowell, Rouse, Varian, Hagen & Matera, New York City, of counsel), *for Defendant-Appellant*.

IRVING RONALD STORCH, Carle Place, New York, *for Plaintiff-Appellee*.

MESKILL, *Circuit Judge*:

Companhia de Navegacao Lloyd Brasileiro (Lloyd), an ocean carrier, appeals from a judgment of the United States District Court for the Southern District of New York, Owen, *J.*, finding Lloyd liable to Allied Chemical International Corporation (Allied), a shipper, for the misdelivery of goods to the consignee, Banylsa Tecelagem do Brasil S.A. (Banylsa). The carrier caused the goods to be delivered without requiring Banylsa to produce the original order bill of lading. Lloyd also challenges the district court's refusal to interpret the Carriage of Goods by Sea Act (COGSA) package limitation, 46 U.S.C. app.

§ 1304(5) (Supp. I 1983), which was incorporated into the bill of lading, to reduce Allied's recovery. The court awarded damages equal to the value of the cargo in United States dollars minus an amount that Allied had already recovered from Banylsa plus interest.

We affirm the judgment of the district court.

BACKGROUND

This case was decided without a trial. The parties submitted to the district court two stipulations of fact; the deposition of Pedro Calmon Filho, an expert on Brazilian law; memoranda, one of which included an appendix; and separate proposed findings of fact and conclusions of law. Allied alleged federal jurisdiction on the basis of admiralty or, alternatively, diversity of citizenship. The pertinent, undisputed facts follow.

In September 1980, Allied, an exporter of chemical products, received from Banylsa an order for a quantity of caprolactam, a crystalline cyclic amide used in the manufacture of nylon. The sale was to be in two lots of 6,000 bags on terms of sight drafts against documents through Banco Bamerindus do Brasil S.A. of Sao Paulo, Brazil (Brazilian bank). The sight drafts were in the amount of the per lot invoice price, $266,756.92 C & F Salvador, Brazil.

In October 1980, Allied delivered to Lloyd at the Port of Norfolk, Virginia two lots of 150 double faced pallets, each lot said to contain 6,000 bags of caprolactam to be shipped to the Port of Salvador, Brazil. The cargo was loaded onto Lloyd's vessel ITAPURA. Lloyd issued clean

order bills of lading that described the cargo, listed Allied as the shipper and showed that the goods were consigned to the order of Banylsa. Banylsa was also listed as the notify party. Allied, through its bank, forwarded the shipping documents—including the sight drafts, the original bills of lading and the original commercial invoices—to the Brazilian bank for handling and collection. Allied specifically instructed the Brazilian bank to deliver the documents only against payment of the sight drafts.

On or about November 12, 1980, Lloyd's vessel arrived at the Port of Salvador. In accordance with local custom and usage, the carrier unloaded the caprolactam at a warehouse under the control of the Administration of the Port of Salvador (the port authority), an agency of the Brazilian government. The caprolactam was undamaged.

Banylsa made payment on only one of the two sight drafts and therefore received from the Brazilian bank only one bill of lading. It is the bill of lading not received and the lot to which it related that are the subject of this dispute. Hereinafter, when we refer to the cargo or to the bill of lading, we refer solely to the misdelivered goods and the bill of lading that covered them.

On November 17, 1980, Banylsa through its agent delivered to Lloyd's agent in Salvador a letter explaining simply that the original bill of lading had not been received and requesting Lloyd to issue in accordance with Brazilian import regulations a "carta declaratoria," a letter declaring that the freight had been paid at the port of origin and that the Merchant Marine Renewal Tax had been paid in Salvador.[1] That same day, Lloyd's agent

---

[1] The body of the letter sent by Banylsa's agent to Lloyd's agent provided as follows:

issued the requested document.[2] The parties do not dispute that to obtain the release of goods from the port authority, a party would have to produce either the original bill of lading or a carta declaratoria from the carrier. Thus, by virtue of the carta declaratoria, Banylsa was able to obtain possession of the caprolactam although it had not paid for the goods and it was not in possession of the bill of lading.

Allied first became aware that the sight draft had not been paid in January 1981. It was not until several weeks later, however, when Banylsa complained about the quality of the caprolactam, that Allied discovered that Banylsa had, notwithstanding nonpayment, obtained possession of the caprolactam. After an investigation that

---

> With reference to Bill of Lading No. 2—Norfolk/Salvador of steamship "Itapura" V. 80148.2 arrived at this port on November 11, 1980, due to the fact that the Original Bill of Lading up to to [sic] the present date has not been received and in compliance with our client (Banylsa Tecelagem do Brasil S.A.)'s request, the said Bill of Lading being consigned to the order of the latter, for the purpose of [customs clearance regulations], we beg hereby your being kind enough to supply a "carta declaratoria" that the freight has been paid at the port of origin and that the T.R.M.M. payment was made here.
>
> J. App. at 27.

[2] The body of the carta declaratoria issued by Lloyd's agent stated as follows:

> Vessel "ITAPURA" arrived on 11/11/1980—150 pallets, marked "BANYLSA-ARATU-VIA SALVADOR BA 473 FIB 8766 WEIGHT 158,876 kgs. containing 6,000 bags of caprolactam consigned to Banylsa Tecelagem do Brasil S.A."
>
> For the purpose of [customs clearance regulations], we state that we do not object to the customs clearance of the cargo referred to above, since the freight and the Merchant Marine Renewal Tax have already been paid.
>
> J. App. at 28.

included an on-site inspection of the goods at Banylsa's facility, Allied rejected Banylsa's quality complaint.

In early April 1981, Banylsa filed a voluntary receivership proceeding in the Civil Court of the District of Salvador, Brazil. On May 8, 1981, Allied made a demand on Lloyd for losses incurred as a result of the carrier's failure to request proper documentation before authorizing the release of the caprolactam. J. App. at 160. The demand letter stated that Allied had been advised by Lloyd that the goods were released on Banylsa's promise to deliver the original bill of lading within 90 days. *Id.* Negotiations between the shipper and the carrier proved unavailing and Allied filed this suit in September 1981.

In May 1981, Allied filed a claim against Banylsa in the receivership proceeding. In September 1983, Banylsa deposited with the Salvador court 20,414,907 cruzeiros to pay Allied's share of the receivership distribution. The amount was equal to Allied's claim in United States dollars at the exchange rate of 76.53 cruzeiros to the dollar, the rate in effect when Banylsa filed its petition. Allied argued that it was entitled to payment at the rate in effect on the date of Banylsa's deposit, 671 cruzeiros to the dollar. On advice of counsel, Allied abandoned its appeal and accepted a sum in cruzeiros equal to less than $40,000 as of September 1983.

In its complaint against Lloyd, Allied charged that the ocean carrier had breached its contract of carriage with Allied. It also claimed that Lloyd was liable for conversion of the cargo because Lloyd authorized the delivery of the cargo to a party not entitled to possession. The district judge decided in Allied's favor and adopted Allied's proposed findings of fact and conclusions of law

virtually verbatim. The findings and conclusions cited no cases and contained not a single reference to the brief but adequate record.

On appeal, Lloyd preliminarily argues that because the district court decided this case on submission and because the court simply adopted the prevailing party's proposed findings verbatim, our review should not be limited by the clearly erroneous standard but should be *de novo*. On the issue of liability, Lloyd raises four challenges. First, it claims that it fully discharged its responsibility under the contract of carriage when it delivered the cargo as dictated by local custom and usage to the government controlled port authority. Second, Lloyd claims that it cannot be liable for conversion either because that would be contrary to Brazilian law or because the rights and liabilities under COGSA, 46 U.S.C. app. § 1300 *et seq.* (Supp. I 1983), are exclusive. Third and fourth, Lloyd raises related arguments, payment and waiver, based on Allied's claim and partial recovery against Banylsa in the receivership proceeding. Finally, Lloyd contends that even if it is liable, the COGSA package limitation, incorporated into the bill of lading, should reduce Allied's recovery to $500 per pallet or $75,000. For the reasons that follow, we reject Lloyd's arguments.

DISCUSSION

A. *The Scope of Review*

The Supreme Court recently and unequivocally rejected the standard of review that Lloyd urges us to employ. In *Anderson* v. *City of Bessemer City*, 53 U.S.L.W. 4314, 4315 (U.S. Mar. 19, 1985), the Court reversed a Fourth Circuit decision on the ground that the appeals court

"misapprehended and misapplied the clearly-erroneous standard." The circuit court had reasoned that an essentially *de novo* review of the record was justified because the district court had adopted, albeit with some variation, the prevailing party's proposed findings of facts. The Supreme Court adamantly disagreed. Emphasizing that "review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception," *id.* at 4317, the Court explained that neither findings based on documentary evidence and thus largely devoid of credibility considerations, *id.*, nor findings adopted verbatim from a party's proposals may be subjected to a more stringent standard of review. *Id.* at 4316.

We certainly do not wish to in any way condone the verbatim adoption of proposed findings of fact. While recognizing the time pressures on district court judges, we have expressed our displeasure with this procedure in the past. *E.g.*, *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1341 n.6 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974). In this we are not alone. *E.g.*, *Bessemer City*, 53 U.S.L.W. at 4316; *United States* v. *Marine Bancorporation*, 418 U.S. 602, 615 n.13 (1974); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). Nonetheless, we are bound to uphold the findings of the court below unless, on the basis of the entire record, we are convinced that they are clearly erroneous. We are not persuaded that the findings below fall short of this familiar benchmark. We therefore leave them undisturbed.

B. *Jurisdiction and Governing Law*

This suit involves claims by a shipper against an ocean carrier arising from an alleged breach of a contract of carriage. Thus it lies within our admiralty jurisdiction. *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 807 (2d Cir. 1971); *David Crystal, Inc.* v. *Cunard Steam-Ship Co.*, 339 F.2d 295, 298 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *see* 28 U.S.C. § 1333(1) (1982). Consequently, this action is governed by federal maritime law.

C. *Liability*

The liability question in this case inextricably involves the critical importance of the documentary transaction in overseas trade. *See generally* G. Gilmore & C. Black, The Law of Admiralty 110-12 (2d ed. 1975). The documentary sale enables the distant seller to protect himself from an insolvent or fraudulent foreign buyer by ensuring that the buyer ordinarily cannot take possession of the goods until he has paid for them. It accomplishes this rather simply. The seller tenders shipping documents, including a negotiable bill of lading, rather than goods to the buyer. By paying for the documents, the buyer gets possession of the original bill of lading. Possession of the bill entitles him to possession of the goods; it represents the goods and conveys title to them. Most likely, the bill will be an order bill of lading, made to the order of or endorsed to the buyer. *See id.* at 96-97. Absent a valid agreement to the contrary, the carrier, the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading. "Delivery to the consignee named in the bill of lading does not suffice to discharge the [carrier] where the consignee does not hold

the bill of lading." 2 T.G. Carver, Carriage by Sea ¶ 1593 (R. Colinvaux 13th ed. 1982). If the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for misdelivery. *David Crystal*, 339 F.2d at 300; *Morse Electro Products Corp.* v. *S.S. Great Peace*, 437 F.Supp. 474, 482 (D.N.J. 1977); *The Cabo Villano*, 14 F.2d 978 (E.D.N.Y. 1926), *modified as to damages*, 18 F.2d 220 (2d Cir. 1927). The ocean carrier's liability arises from rights of property, 1 T.G. Carver, *supra*, at ¶ 120, and "[d]elivery to a person not entitled to the goods without production of the bill of lading is prima facie a conversion of the goods and a breach of contract." 2 *id.* at ¶ 1593 (footnotes omitted).

The dispute herein involved precisely the consequence that the documentary transaction is intended to avert: Banylsa, which turned out to be an insolvent buyer, was given possession of goods for which it had not paid. This result would have been avoided had Lloyd, in keeping with its obligation, demanded the production of the bill of lading before permitting Banylsa to claim the caprolactam.

Before we can hold Lloyd liable for causing Allied's loss, however, we must examine the respective rights and obligations of the parties at the time of the apparent misdelivery to determine whether Lloyd was somehow relieved of its duty to take up the bill of lading. Although the cargo had been discharged from the ship and, thus, the actual carriage completed when the apparent misdelivery occurred, the relationship between Allied and Lloyd was still governed by the contract of carriage. *See Leather's Best*, 451 F.2d at 807. Our analysis begins with the bill of lading, the document evidencing the contract of carriage. *David Crystal*, 339 F.2d at 297. We bear in mind

that bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier. *The Caledonia*, 157 U.S. 124, 137 (1895); *West India Industries* v. *Tradex*, 664 F.2d 946, 951 n.9 (5th Cir. 1981); *Mitsui & Co.* v. *American Export Lines*, 636 F.2d 807, 822-23 (2d Cir. 1981); *E. Gerli & Co.* v. *Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931) (L. Hand, *J.*).

Lloyd contends that clauses 1 and 12 of the bill of lading absolve it from liability. Clause 1 provides that "[t]he Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier." J. App. at 32. Clause 12 provides that "[t]he responsibility of the Carrier, in any capacity, shall altogether cease and the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities." J. App. at 34.

Lloyd's reliance on these clauses is unavailing because they are null and void. In *David Crystal*, 339 F.2d at 297, we held clauses similar to 1 and 12 to be invalid under the Harter Act's proscriptions against certain limitations on carriers' liability. *See* 46 U.S.C. app. § 190 (Supp. I 1983). Although the enactment of COGSA sharply curtailed the applicability of the Harter Act, 46 U.S.C. app. § 190 *et seq.* (Supp. I 1983), to ocean bills of lading and matters of ocean carriers' liability, absent a valid agreement to the contrary, the Harter Act still governs prior to loading and after discharge of cargo until proper delivery is made.[3] *Caterpillar Overseas, S.A.* v. *S.S. Expeditor*,

[3] Where goods are shipped under an order bill of lading, it would seem logical to include in any definition of proper delivery the fulfillment of the carrier's duty to ensure, absent specific agreement to the contrary, that the cargo is released to the holder of the properly endorsed bill.

318 F.2d 720, 722-23 (2d Cir.), *cert. denied*, 375 U.S. 942 (1963); G. Gilmore & C. Black, *supra*, at 147-48. While a carrier and a shipper may specify by agreement what the responsibility of the carrier should be after the goods are discharged, the carrier may not simply disclaim all post-discharge responsibility. *Leather's Best*, 451 F.2d at 807 n.5.

Insofar as Lloyd relies on these clauses as agreements not to eliminate but merely to reduce its liability, which would be permissible under the Harter Act, its arguments are unavailing because the district court found that the parties did not intend the clauses to have that effect. It is undisputed that the parties agreed that COGSA, which by its terms does not apply either before loading or after discharge of cargo, 46 U.S.C. app. § 1311, was to govern before the goods were loaded and after they were discharged from the ship. This was a permissible agreement, *see Colgate Palmolive Co.* v. *S/S Dart Canada*, 724 F.2d 313, 315 (2d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3791 (U.S. Apr. 30, 1984), and made COGSA "apply [not] of its own force as a statute, but merely as a contractual term in the bill of lading."[4] *Id.* Because COGSA § 1303(8) provides that the parties may not, except as otherwise provided by COGSA (see our discussion below), agree even to lessen the carrier's liability for loss arising from its own negligence or fault, and COGSA was incorporated into the bill of lading, the court's finding that clauses 1 and 12 of the bill of lading did not lessen Lloyd's liability for its negligent misdelivery is not clearly erroneous.

---

[4] We reject Lloyd's argument that COGSA's remedies are exclusive under these circumstances. The wholesale incorporation into the bill of lading of COGSA's terms does not suffice to extinguish the shipper's right of action for misdelivery. We are particularly loath to liberally construe general language in a contract of adhesion to the obvious advantage of the drafting party.

While it is clear, then, that Lloyd retained some responsibilities after discharge, the bill of lading did not specify what they might be. Therefore, "the law steps in to fill the lacuna" and provides that when Lloyd discharged the cargo, it assumed the status of a bailee. *David Crystal*, 339 F.2d at 298; *Leather's Best*, 451 F.2d at 811-12. The transfer of the cargo to the port authority, without more, did not alter this status; thus Lloyd remained presumptively responsible for the proper delivery of the goods. *Leather's Best*, 451 F.2d at 812; *David Crystal*, 339 F.2d at 298. We have previously articulated the applicable standard of responsibility under admiralty law: "a bailee is absolutely liable for misdelivering cargo, unless his mistake as to the person entitled to receive the goods was induced by the bailor" or the contract of carriage otherwise reduced or eliminated his liability. *David Crystal*, 339 F.2d at 298. There is no suggestion in the record that Allied induced the misdelivery. Allied was not even aware until well after the event that Banylsa had acquired possession of the goods. We have already noted that the parties could not lawfully agree to eliminate Lloyd's liability entirely and have upheld the district court's finding that they did not intend that clauses 1 and 12 would lessen Lloyd's liability for negligent misdelivery.

The remaining question is whether the parties intended, by their incorporation of COGSA, that any provision of COGSA itself would lessen Lloyd's liability for negligent misdelivery. One important consequence of the enactment of COGSA was the elimination of absolute liability of carriers. Under COGSA, carriers can be liable for loss of or damage to cargo only on the basis of fault. G. Gilmore & C. Black, *supra*, at 150. After describing a number of specific duties, the statute provides somewhat generally,

in language that seems relevant to this case, that the carrier shall not be liable for losses resulting from

> [a]ny . . . cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

46 U.S.C. app. § 1304(2)(q).

Unfortunately for Lloyd, however, this provision seems to support rather than undermine the imposition of liability for the misdelivery. COGSA specifically left unaffected the applicability of the Pomerene Bills of Lading Act, 49 U.S.C. app. § 81 *et seq.* (1982), to ocean bills of lading. Pursuant to the Pomerene Act, a carrier operating under an order bill of lading is justified in delivering the goods to one lawfully entitled to them or to one in possession of an order bill "by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee." 49 U.S.C. app. § 89. When Lloyd caused the goods to be released to Banylsa, by means of the carta declaratoria, the bill of lading was still in the custody of the Brazilian bank because payment had not been made on the sight draft. Not having paid on the draft, Banylsa was neither lawfully entitled to the goods nor in possession of the bill. Delivery to Banylsa, therefore, was not justified. In light of its unjustified authorization of the delivery, Lloyd could not possibly show, as required by section 1304(2)(q) of COGSA, that it did not by its actual fault contribute to Allied's loss.

Having found nothing in the contract of carriage that eliminates or reduces the carrier's duty to deliver the cargo only to a party in possession of the bill of lading paid to his order or properly endorsed, we conclude that the district court correctly determined that Lloyd should be liable for the loss that resulted from its misdelivery. *See* 49 U.S.C. app. § 90; *see also Pere Marquette Ry.* v. *J.F. French & Co.*, 254 U.S. 538, 546 (1921); *Alderman Brothers Co.* v. *New York, N.H. & H.R.R.*, 102 Conn. 461, 465 (1925).

The fact that the government controlled port authority, rather than Lloyd itself, physically delivered the goods to Banylsa does not in any way relieve Lloyd from liability. As previously noted, it is undisputed that unless Banylsa presented to the port authority either the original bill of lading or a carta declaratoria issued by the carrier, the port authority would not have permitted Banylsa to take the cargo. Because Banylsa did not pay the sight draft and take possession of the bill of lading, Lloyd retained control over the goods. Thus, Lloyd acted at its peril when it authorized the release of the goods to Banylsa without demanding production of the bill. *The Cabo Villano*, 14 F.2d at 979-81.

It is surely obvious at this point that Lloyd's Brazilian law arguments are inapposite. The rights and obligations of the parties herein are rooted in United States law. Both COGSA, 46 U.S.C. app. § 1300, and the Harter Act, 46 U.S.C. app. § 190, cover transactions involving carriage from ports in the United States to foreign ports. Moreover, Lloyd's own bill of lading provided that it should "be construed and the rights of the parties thereunder determined according to the law of the United States." J. App. at 34.

Finally, Allied's claim and partial recovery against Banylsa in the receivership proceeding did not extinguish Allied's right of action against Lloyd. By misdelivering the caprolactam to Banylsa, Lloyd was responsible for Allied's loss. Allied is entitled to be compensated for the full amount of its loss in United States dollars. Of course, the amount that Allied has already recovered from Banylsa must be considered in mitigation of the damages that Lloyd must pay.[5]

D. *Damages*

Citing both COGSA and clause 17 of the bill of lading, Lloyd claims that its liability is limited to $500 per pallet or $75,000 ($500 × 150 pallets). Section 1304(5) of COGSA, which Lloyd argues is applicable through the express extension of COGSA contained in the bill of lading, provides in pertinent part that the carrier shall not be liable for loss of or damage to cargo in an amount greater than $500 per package "unless the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier." Clause 17 of the bill of lading provides in relevant part that the carrier's liability for damages shall be identically limited "unless the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the Bill of Lading and extra freight paid." J. App. at 34. The parties apparently agree that the term "package" has the same meaning in COGSA and clause

---

5 We express no opinion at this time as to whether the entire prior recovery would be similarly considered to mitigate the award against a carrier who can successfully claim a statutory or contractual limitation on damages.

17. We therefore need not on that ground distinguish between the COGSA and the clause 17 limitations.

Allied maintains that the district court properly refused to limit damages because Lloyd failed to plead the limitation as a special defense and never moved to amend its answer to include the defense. Our Circuit has never addressed whether a partial limitation is waived if not pleaded as a special defense. We need not decide it here because Allied also argues that the district court was correct because the pallets should not be considered to be the packages. Therefore, Allied claims, the limitation is irrelevant. We agree.

The question of what constitutes a COGSA package, a question we frequently confront, is largely and in the first instance a matter of contract interpretation. *Allied International American Eagle Trading Corp.* v. *S.S. "Yang Ming,"* 672 F.2d 1055, 1057, 1061 (2d Cir. 1982); *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft*, 375 F.2d 943, 946 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). The most obvious place for us to begin our search for the intent of the contracting parties is, of course, the bill of lading. *Binladen BSB Landscaping* v. *M.V. "Nedlloyd Rotterdam,"* 759 F.2d 1006, 1012 (2d Cir. 1985). The bill of lading herein contained six columns under the usual general heading, "Particulars Furnished by Shipper." Only two of those columns and only a few of the items appearing in those columns are important to our decision. The first column, headed "No. of Pkgs.," contained the entry "150." Immediately to the right of that number, squarely in the column labeled "Description of Packages and Goods," was entered "Double Faced Pallets Said to Contain: 6000 Bags Caprolactum [sic]." Just above this

entry, in the same column, it stated "Rate: $110.00 LT Value: $1657.00 LT." The abbreviation LT stands for long ton, the equivalent of 2,240 pounds.

We have long accepted that a pallet may, under appropriate circumstances, be deemed to be a package. *Yang Ming*, 672 F.2d at 1062; *Standard Electrica*, 375 F.2d at 946. This may be so even where the containers on the pallet themselves constitute ordinary commercial units. Moreover, in *Yang Ming* we ruled that where, as here, the shipper gives written notice in the bill of the number of containers on the pallets, the carrier is not necessarily bound to that number if the bill elsewhere lists the number of pallets as the number of packages. *Yang Ming*, 672 F.2d at 1061. Thus the bill of lading could support either the shipper's or the carrier's position; it is not determinative. We do note, however, that in *Yang Ming*, the number of pallets was declared several times in the bill of lading to be the number of packages. *Id.* at 1063. We therefore were reasonably certain that the parties intended the pallets to constitute packages for limitations purposes. Here, however, the number of pallets was listed but once—as was the number of bags. Looking only at the numbers, we would conclude that the parties' intent is ambiguous.

But the bill contains another and potentially more significant entry—the freight charge—which we believe indicates that the parties did not intend the pallets to be packages. Lloyd contends that it would have charged a higher rate if it was potentially liable for the full value of the goods. Indeed, clause 17 explicitly and COGSA implicitly "cast upon the shipper the burden of declaring the nature and value of the goods, and paying a higher

tariff, if necessary, [in order to] impose a higher liability upon the carrier." *Standard Electrica*, 375 F.2d at 945.

The excerpts cited from the bill of lading show that Allied adequately met its burden to declare the nature and value of the goods. And, despite Lloyd's attempts to introduce new evidence at this stage, we are limited to the record, and the record clearly shows that the freight rate was based on the value of the goods. Caprolactam valued at less than $2,000 per long ton was charged a rate of $110 per long ton. J. App. at 165. More valuable caprolactam was charged a rate of $131.50 per long ton. *Id.* Thus, under the applicable tariff, Allied had no option to pay a higher rate. Having paid a freight charge based on the value of the goods, Allied could reasonably have expected to recover their value if they were lost. Similarly, having levied a rate keyed to value, Lloyd could reasonably have expected to be liable for that value. It would be illogical to ascribe a contrary intent to the parties.

As a final point, we reiterate that ocean bills of lading are contracts of adhesion. Ambiguities, therefore, must be resolved against the issuing carrier. *Mitsui & Co.* v. *American Export Lines*, 636 F.2d at 822-23. We conclude that the district court's finding that the parties did not intend the pallets to be packages was not clearly erroneous. Therefore, we affirm the district court's award of damages.

CONCLUSION

The judgment of the district court is affirmed. Appellant is liable for costs.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of November one thousand nine hundred and eighty-five.

Docket No. 85-7103

ALLIED CHEMICAL INTERNATIONAL CORP.,

Plaintiff-Appellee,

v.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant, Companhia De Navegacao Lloyd Brasileiro

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk